



A GUIDE TO MAKING REFERENCE AND OTHER BACKGROUND CHECKS

Employers need enough information to make good decisions about applicants. Although checking references can take place at any point in the selection process, it's usually one of the final steps.

References are a tool for verifying information with former employers and educational institutions. They also help get information about the quality of job performance. What you learn will help you make the final decision. For most jobs, you don't need to do an extensive background check.

Background checks help determine whether a person has a criminal conviction, record of abuse, poor financial credit, or other history that would keep you from hiring him or her. Most employers that do background checks must meet the requirements of the Fair Credit Reporting Act.

References often provide information that applicants leave out. You can learn a lot by talking to other people who know their performance well. After learning more through references, you might even decide to hire an applicant you considered marginal. Failing to do these checks may mean you're hiring someone lacking the education or experience to do the job – or bringing in performance or behavioral problems.

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Checking An Applicant's References

As a way of evaluating prospective employees, employers use reference checks almost as often as interviews. Like all other selection procedures, reference checks help you tell the difference among applicants. Many managers say that reference checks have helped them avoid big mistakes in hiring.

Making a reference check means contacting a person or organization that can offer information on the qualifications and competencies of an applicant. You can check references over the telephone or in writing. Many employers like to use the phone. It's an interactive medium that enables follow-up questions to clarify information. It also enables the reference checker to note other aspects of the communication, such as emphasis, hesitation, and tone of voice.

If you check references, let applicants know that you plan to do so. Inform them in the job posting, vacancy announcement, and interview. You don't need a written release or permission to contact current or previous employers; however, you can decide to have applicants give you written permission for each one. Some organizations require signed permission before giving any reference information.

Some applicants prefer that you not contact their current employer. While understandable, it's unrealistic. They can check a box on the state application, asking that you inform them before contacting the current employer. You're not asking the applicant's permission to check references with a current employer. This is a courtesy.

Sometimes applicants want to tell their current boss that they've applied for a job and to expect a reference check. If you intend to check with the current employer, and the applicant doesn't want you to, it's reasonable to say the applicant has voluntarily withdrawn his or her application.

Why is it hard to get references?

Some employers no longer give any reference other than confirming dates of employment. Withholding reference information has become a common practice among employers because they fear legal liability. Employers' attorneys advise them that they risk violating EEO laws, defamation laws, and the employee's right to privacy.

It's true that giving references can pose a risk for employers. Consider these damaging practices:

- A negative reference that refers to the person's gender.
- A negative reference that refers to the ancestry of the person's spouse.
- A negative reference because a person invoked legal rights, such as a discrimination claim, a worker's compensation claim, or FMLA leave.
- A strong implication, unsubstantiated, that the person is dishonest or untrustworthy.
- Highly charged words in a reference, like "liar," "thief," "alcoholic," and so on.
- A malicious reference clearly aimed at damaging the person's chances for a job.

A current or former employer risks liability for giving this sort of reference. Employers need to recognize and refrain from references that can damage people. At the same time, employers need to recognize and encourage honest references that give helpful information to a prospective employer.

Montana has three laws that affect references. Called the "blacklisting laws," they are found at 39-2-801, 39-2-802, and 39-2-803, MCA. Taken together, they say that a former employer may not blacklist or try to keep a former employee from getting another job. A former employer may give an honest statement about the reason for discharging an employee. However, if the employee asked for a written statement about the reason and the employer failed to give it, the employer may not state the reason in a reference.

Some people have sued former employers for "defamation" when giving a reference. Defamation of character means attacking or injuring a person's reputation through false and malicious statements, made verbally or in writing. Title VII of the Civil Rights Act protects employees against defamation when the employer's conduct is motivated by illegal discrimination.

These laws seek to protect employees from malicious references, but they don't prohibit giving references. In fact, the 1999 Legislature passed a bill that limits liability for a "nonpublic employer" providing "information about a former or current employee's employment-related performance." A private sector employer is "not liable for civil damages ... unless the employer knowingly, purposely, or negligently disclosed information that was false" (27-1-737, MCA).

In time, employers will learn about this legal protection and about good practices in giving references. As this knowledge grows, so will the amount of useful information you can get when checking references.

How do you get references?

On the State of Montana application, the applicant lists current and former employers. These are the best sources of reference information. Some applicants will provide other references that may or may not be of value. One problem with other references: they may reveal the applicant's religious or political affiliation.

Use good judgment in deciding which references to contact. More recent employers will probably give you more valid information than employers further in the past.

Applicants lacking previous job experience present another problem. College professors or other teachers can usually refer to small, specific sample of the applicant's competencies. The same can be said of the clergy, friends, or other personal references given by the applicant. These people are less likely to have information about the applicant's ability to do the job for you. If you're seriously considering an applicant, ask him or her to think of someone who knows about his or her job skills – even if it's a work-study manager, a former lawn-care customer, or a parole officer.

You can ask references about the applicant's:

- specific job skills
- general approach to the job
- attendance record
- ability to work with others

You can ask references to make general statements about the applicant, answer specific questions, or rate the applicant (such as on a scale of 1 to 10). Don't ask questions that aren't job-related.

Cover the same reference areas for each applicant. While the items you check on need to be consistent, your actual questions may vary when you're confirming information about different applicants with different references.

Take extensive notes when checking references over the phone. Write down the name, title, and employer of the person you talk to. Keep a detailed summary of the questions you ask and what the person says.

What questions shouldn't you ask?

Avoid questions that ask about protected or suspect areas, such as:

- race
- color
- gender
- age
- national origin
- religion
- disability
- marital status
- sexual orientation
- arrests
- military service
- children

Some questions might not directly address such areas, but could still have an adverse impact. Be sensitive to the effect your reference questions might have on protected groups, such as racial minorities, women, and people with disabilities. For example, these questions could cause problems:

- How did this person "fit in" with the overall work group?
- Did this person resist working overtime?
- Did you notice any attendance problems related to family matters?
- Was this person able to "keep up" with the production level of other workers?

Although these questions might address some legitimate areas, their wording or tone could lead to discriminatory responses. And that could lead to a suspect decision.

The Equal Employment Opportunity Commission offers two guidelines for conducting reference checks:

- Will the answer to the question, if used in deciding a selection, have a disparate effect in screening out member of a certain race or members of one sex? In other words, will it disqualify a significantly larger percentage of one group than other groups?
- Is this information really needed to judge an applicant's competence or qualification for the job?

Examples of other reference questions to avoid, deal with an individuals' legal rights:

- Has the person ever filed a discrimination suit against your department?
- Has the person ever requested an accommodation due to a disability?
- Has the person ever filed a workers' compensation claim against your department?
- Has the person ever tried to organize a union with your workers?

Avoid other areas of privacy; they have no value in predicting job performance anyway:

- politics
- organizational memberships
- legal off-work activities

With regard to that last item, take a look at 39-2-313, MCA. This law prohibits any form of discrimination "because the individual legally uses a lawful product off the employer's premises during nonworking hours." The law aims mainly at "food, beverages, and tobacco," but it could also apply to other products, such as firearms, snowmobiles or pogo sticks.

If you think you need a consumer report or other credit rating, you have to follow the requirements of the Fair Credit Reporting Act (FCRA). (See section on FCRA at the end of this chapter.)

What if you don't check references – any liabilities?

The biggest legal risk facing employers who don't check references is "negligent hiring." Negligent hiring occurs when three elements converge:

- an employee injures a third party ;
- the employer should have known about a danger posed by the employee; and
- the employer could reasonably have expected the employee to have contact with the third party.

For example, a school could be liable for hiring a teacher with a record of sexual abuse of minors if the teacher sexually assaults and injures a student. Positions of power and authority, including jobs in law enforcement, health care, childcare, home care, and building maintenance, require thorough background checks. Checking employment references is one step in the process.

What should you do if negative information comes up during the reference check?

Sometimes you get information during reference checks that makes you reluctant to hire an applicant. For example, what if you find out one applicant was discharged from a job because she was convicted of criminal possession of dangerous drugs with intent to sell. Since the discharge, she has met the conditions for a deferred sentence, which expunges the official record and erases the conviction on her record.

You can't automatically reject applicants because of past convictions. Consider the type, number, and recentness of convictions. Also consider whether the offense behind a conviction has any relationship to the job. For example, the offense of passing bad checks would have no relationship to operating a snowplow. But you'd have to think about whether that person should handle your accounts payable and receivable.

If you get other types of negative information about an applicant during a reference, you can ask the applicant for his or her side of the story. One bad reference among other good ones for an applicant might reflect conflicts within that job. A pattern of less-than-satisfactory references more likely shows that the applicant has performance problems.

Are there any tips you can use in checking references?

For employers who check references as an essential step of their selection, the following tips can boost the quality of responses.

- Ask only for job-related information. Make your questions specific to the job the applicant is seeking. You might describe the required knowledge, duties, responsibilities, and behavioral competencies to the reference. Ask if the applicant had similar responsibilities and how he or she performed them.
- Ask the applicant to help you set up the reference check. If the applicant tells the reference that you'll be calling, that reference may be more willing to talk with you.
- Write down your reference questions before contacting anyone. You can find a sample format in **Appendix 13**. Use the same questions for all applicants' references. (You don't need to check references on every applicant; most agencies check only for finalists.)
- Even if you don't get any answers, document all the questions you asked.
- Begin with easy, non-threatening questions that verify information from the applicant. Use tact and persistence, but don't force the issue. Ask for information such as job title, number of days absent last year, pay rate, and reason for termination.
- Stay away from purely subjective areas. Ask about behaviors that indicate attitude, initiative, or mature responses. Ask for verifiable, factual information that you can document. Link behaviors that show attitude or initiative to job duties or organizational styles.

For example, explain that the employee will work under general supervision and will have to set his or her own daily priorities. Ask the reference if the applicant worked under those conditions. If so, how well did the applicant work? Were there problems? This type of inquiry assesses initiative and attitude as these behaviors relate to your job.

- If the former employer wants to add subjective details, mention that you're concerned with facts. Consider the person who provides subjective information. Did this person directly supervise or work closely enough with the applicant to really evaluate him or her? Is it possible the reference giver has an ax to grind, or that some bias is at work? Appropriate references are those who have direct knowledge of applicants' qualifications.
- Check several references, particularly if one reference turns up negative information. Does each previous employer say much the same or does information conflict?
- Consider letting the applicant explain discrepancies or negative information.

Is the information obtained from references always a good predictor of future performance?

Past behavior is the best predictor of future performance, so the popularity of reference checking seems logical. Ideally, a former employer would be the best source of information about how well an applicant would perform on your job. However, references pose problems with reliability and validity.

To get reliable ratings, people evaluating the applicant should answer your questions about the applicant consistently. However, research shows that employers asked to rate a former employee don't always give the same responses.

It's common for employers to be lenient in evaluating a former employee; this is a major drawback to the reliability of reference checks. Employers sometimes give a positive job reference about employees they fired because they think it'll help the employee get another job quickly. And some employers agree to give a good or neutral reference in exchange for an employee's resignation.

Don't put a lot of weight on positive references unless they're specific to job performance and behaviors. Most people giving a reference can find something good to say about anybody.

To be valid, reference checks must be job-related. Some studies have found references don't always give accurate information predicting job success of applicants.

Other studies found that variables such as sex, race, age, and length of time the employee stayed on the job can influence references. When race differed between employer and former employees, people giving references tended to be lenient about members of the same race and strict about members of another race. Employees who remained with a job for two months or less tended to get harsh references – possibly because the employer didn't get much return on the investment of hiring and training the person.

With all the drawbacks described here, why should you bother to check references? You need to understand what a reference check will tell you. Its usefulness in predicting future success on your job may be limited. However, references can confirm information you already have. And they often give you new information that can be critical when deciding who to hire. For these reasons, it's worthwhile to check references.

Is there a list to assist when checking references?

The following questions can help you design and evaluate your reference checks.

1. Are the questions you're asking all directly related to the job? Are the questions specific enough?
2. Are the questions all objective? Do they seek facts rather than opinions?
3. Are you asking the right person? Was this person in a position to observe and supervise the applicant?
4. Have you checked as many references as needed?
5. Have you asked for the same questions for all applicants?
6. Could your questions lead to answers that will have an adverse impact on one or more minority groups?
7. Would you really need this information to judge an applicant's competence or qualification for this job?
8. Are you seeking information bearing on an applicant's
 - credit worthiness?
 - credit standing and capacity?
 - character?
 - general reputation?
 - personal characteristics?
 - mode of living?

If you are, you have to conduct your inquiry in the manner required by the Fair Credit Reporting Act.

9. Have you documented your contacts, questions, and the responses you received?

Should you limit the information given to another employer checking references?

Should your agency provide references about former employees? Well, that question leads to other questions:

- Does your agency may have a written policy on references?
- Have managers received training on giving references?
- Does your agency ask discharged employees to sign a permission form for giving references to prospective employers?

Giving a "neutral" reference has become a common practice. Some employers limit reference information to these areas:

- confirming that the employee worked full-time or part-time during a stated time period;
- describing the title and nature of the job held; and
- verifying what the employee earned.

This limited response makes it hard for employers to get information on performance – or even to prevent negligent hiring. It's in the best interest of all employers for each employer to adopt a structured method for giving references.

Many prospective employers suspect an applicant has a conduct or performance problem when a former employer doesn't give an enthusiastic reference. If your agency has a policy of providing only a "neutral" reference, let the caller know about the policy. This explains why you can't give more information.

If you are authorized to provide a reference, know whom you're talking to. Anybody can call and ask questions about a former employee. Ask why they want to know. If you have any doubt about the caller, get a company name and phone number. This lets you verify the identity by calling back. If you get a reference request in writing, copy the request before answering it.

Maybe you noticed that Montana's "reference law" (27-1-737, MCA) pertains only to private sector employers (see page 3 in this chapter). Public agencies can still limit their legal exposure under a common law doctrine known as "qualified privilege." Qualified privilege, properly met, gives immunity to employers who reveal job-related information about a former or present employee to another employer. Qualified privilege also protects employers who discuss criminal acts of their employees with the police.

The doctrine recognizes two elements:

- It's in the best interest of employers to exchange information about employees; they have a common interest in hiring good employees.
- It's in the best interest of the public to allow employers to exchange of information about employees.

Calling this privilege "qualified," means the employer must satisfy certain conditions to enjoy the privilege:

- The employer giving the reference must give the information in good faith. Give only factual, truthful information. Make statements that are based only on relevant, observed, and documented evidence. Be sure to separate facts from opinions when providing information about an employee. Before making a negative statement about a former employee, consider whether you could prove it's true and that you made the statement without malice.

Under Montana law (27-1-221, MCA) you can be guilty of actual malice if you:

- 1) Knew of facts or intentionally disregarded facts that created a high probability of injury to the person;
 - 2) then deliberately and intentionally acted with disregard to the high probability of injury to the person; or
 - 3) deliberately acted with indifference to the high probability of injury to the person
- Limit the information you give to the questions you get. Don't give information that the requester didn't ask for.
 - Give the information at the proper time and in the proper manner. Don't give out information in casual situations where unauthorized people might hear it.

- Communicate only with the proper parties. Don't share negative information with a third party who shouldn't get it. A prospective employer is a "proper party." Make sure you're confident that a reference check is legitimate.
- Make sure the information requested is related to the requirements of the job.

Maintain your professionalism. Don't allow a personal dislike of or anger toward an employee lead you to make damaging statements. Answer questions evenly and unemotionally – avoid any special tone of voice or inflection.

Don't talk about the employee's personal life unless it interfered with the job. Try to limit comments specifically to the job. And avoid making broad statements such as, "He had sloppy work habits." Instead, describe the employee's behavior in detail.

Several conditions can lead to losing the protection of qualified privilege:

- You don't believe what you are saying is true.
- You do believe what you say is true, but don't have reasonable grounds for the belief.
- You give the information for some purpose other than that allowed by the privilege.
- You give the information to someone who has no need to know it
- You use abusive or spiteful language.
- Your information is harmful or potentially harmful and not related to the inquiry.
- You give the information out of malice, not for a legitimate purpose.

Document all references you give. If the reference is written, make a copy for the file. If you give a reference over the phone, keep notes as you speak. Afterwards, write a summary memo for the file, listing the questions and the answers you gave.

Background checks and consumer reports

Some applicants give false information on their applications, résumés, and other documents. It usually relates to their employment experience, positions, dates of employment, and degrees earned. Verifying some of the information you get can help ensure you're hiring truly qualified applicants.

The most common background checks seek information in one or more of these areas:

- qualifying credentials – diplomas, licenses, certificates, degrees granted;
- social security records – to confirm identities of applicants;
- employment history;
- right to work in the USA;
- driving records;
- education;
- military records;
- character references;
- criminal records;
- student, client, patient, or inmate abuse; and
- consumer credit history.

While all agencies should do a reasonable check on applicants, the measure of what's reasonable will vary. For example, you have to check the employee's right to work in the United States. Other checks may not be needed for all jobs.

The qualified privilege protects employers doing reference checks and verifying employee information. You don't need to have the applicant sign a permission release before seeking this kind of information. (However, many schools and employers won't release information without permission.)

For more in-depth background checks, the Fair Credit Reporting Act requires you to give the applicant advance notice and get permission. No one should conduct these checks without knowing the law and complying with it. Agencies doing background checks must inform applicants on the job posting or during the interview.

Here are some common guidelines for background checks:

- Carefully review all the information an applicant provides.
- Pay special attention to gaps in work history, as well as any questions the applicant fails to answer. Ask the applicant to tell you about the gaps and other missing information. Verify the information you get.
- Try to get information from former employers. Even if those employers have a policy against releasing personnel information, you'll be able to show that you tried to get it.
- Document all findings from background checks.
- Keep all information from background checks confidential.

Before deciding to do a thorough background check, your agency needs to show a job-related purpose for the check. The following questions can help establish the purpose:

- Will the employee have extensive contact with public?
- Will the employee handle money or other financial resources?
- Will the employee give care to children or vulnerable adults?
- Will the employee enter people's homes as part of the job?
- Will the employee carry a firearm or other weapon on the job?
- Will the employee have access to material deemed confidential under federal or state laws?
- Will the employee have regular access to controlled substances?
- Will the employee have access to secure areas, restricted to the public and other employees?
- Will the employee have access to keys or other methods to gain entry to financial resources or other employees?

You can get more detail below on three types of background checks – criminal records, patient or inmate abuse, and consumer credit reports.

Criminal background checks

Criminal background checks usually apply to jobs where there is a job-related business necessity or a statute requires it. A fingerprint-based check will yield the most thorough search on an applicant. Searches using only name, date of birth, and social security number don't usually yield enough information to tell whether the applicant has a record that disqualifies him or her.

Doing a criminal background check usually involves an automated criminal record check. This could include looking into felony convictions and driver license history. Records of arrest are okay in limited circumstances: there has to be a valid business necessity to know the information. In addition, Montana courts have interpreted 44-5-301, MCA, to mean employers may not ask applicants about misdemeanor convictions and deferred prosecutions. One more thing – expunged or sealed records of criminal convictions make it legitimate for applicants to say they’ve never been convicted of a crime.

The Montana Department of Justice restricts use and dissemination when it provides criminal history records:

The following record is provided based solely on the name and numeric identifiers provided and no assurances are made the subject of inquiry and the subject of record is one and the same individual. If the information is used to disqualify an applicant, volunteer or employee, the official making the determination shall provide the subject of inquiry the opportunity to complete or challenge the accuracy of the information contained in the Montana identification record. Further, an individual should be presumed not guilty of any charge/arrest for which there is no final disposition stated on the record or otherwise determined. If the subject of record wishes to correct the record as it appears in the Montana Criminal History Repository, the individual should be advised that the procedures to change, correct or update the record are set forth in Title 44, Section 44-5-215.

A criminal background might disqualify applicants for some jobs. For example, anyone hired into a law enforcement or corrections job in Montana must carry, be issued, or possess a firearm or ammunition. Someone convicted of a crime whose punishment prohibits carrying firearms can’t get a job in law enforcement or corrections. Only if the conviction has been expunged, set aside, or pardoned – or if the person has had full civil rights restored – could you hire the person for such a job.

If you use criminal background checks, you must also consider these areas in relationship to the job:

- the type of offense
- status of the sentence
- elapsed time since conviction
- subsequent employment record
- individual character and reference checks

Violent and Sexual Offenders

The Department of Justice keeps the Sexual and Violent Offender Registry – a list of violent and sexual offenders living in Montana. You can search the list by name, city, or county, and by the type of offense. You can find the list on the Department of Justice website: <http://www.doj.mt.gov/svor/search.asp>. There is no fee to use the registry. Anyone with Internet access can use it.

Driving Records

The Records and Driver Control Bureau of Department of Justice collects, stores, and maintains motor vehicle records in Montana. In the past, motor vehicle records were available to anyone who asked. In 2001, the Legislature passed the Montana Driver Privacy Protection Act (61-11-501, MCA, et seq.) This law restricts access to driver information.

State agencies can ask about a driving record. Follow these steps:

1. write the request on agency letterhead;
2. state whether the request applies to employment screening, insurance, or other allowable purpose; and
3. list the applicant's full name, date of birth, and social security number – or driver license number.

The Bureau charges a fee for this service. You can more information on the Department of Justice website: <http://www.doj.state.mt.us/driving/drivingrecords.asp>

“Private Eyes”

Private investigators can't search law enforcement databases. They can, however, search local court records. Investigators also can collect and relay information that wouldn't necessarily be in the criminal justice system. Their expertise and fees vary widely.

Agencies should check references before engaging a private investigator. The State Procurement Bureau, Department of Administration, keeps a list of private investigators in Montana who want to work for state agencies. Call (406) 444-2575 to get the current list.

Checking other areas – breach of security; abuse, mistreatment, or neglect

For some jobs, you might ask each applicant if he or she has ever been disciplined for violating a policy on breach of security, abuse, mistreatment, or neglect. If the applicant answers "yes," ask for details about the incident. Verify the incident with past employers. Depending on how severe the behavior was, your agency will have to decide whether to reject the applicant.

If the job involves direct care for children, the elderly, or clients with disabilities, you can run a criminal background check through the Montana Criminal Justice Information Services Bureau. See the information in previous sections of this chapter.

The Department of Public Health and Human Services maintains a Nurse Aid Registry. The Registry lists people certified as nurse aides in Montana. It also maintains a record of any senior or other patient abuse. You can find out more about the registry by calling (406) 444-4980.

Fair Credit Reporting Act

In most cases, you shouldn't check into applicants' financial status. The inquiry can easily lead to discrimination that violates Title VII of the Civil Rights Act. For example, asking about car ownership, rental or ownership of a house, and past garnishment of wages may result in illegal discrimination. Remember, any sort of background check must directly relate to job duties.

The Fair Credit Reporting Act (FCRA) covers consumer credit checks and other background checks. The law defines a consumer credit report as:

- any written, oral, or other communication about a consumer; and
- that concerns any of these areas:
 - creditworthiness;
 - credit standing and capacity;

- character;
- general reputation;
- personal characteristics; or
- mode of living.

Given proper disclosures, employers may use credit reports. The uses can include hiring, firing, investigating misconduct, or other adverse actions against an employee. Agencies usually get credit reports from a private reporting firm.

Be sure to consult your agency legal counsel and personnel officer before seeking a credit report. The information presented here is general; it doesn't cover all the requirements of FCRA.

Before you can get a credit report on an applicant, FCRA requires you to do these things:

- Give the applicant written notice of disclosure so he or she clearly understands that you'll be seeking a credit report.
- Get written permission from the applicant for the credit check.
- Inform the credit-reporting firm that (1) you've followed first two steps and (2) if the credit report leads to any adverse action, the applicant will get a copy of the report and a summary of rights under FCRA.

Before you take any adverse action against an employee or applicant due to information from a credit report, you have to give the person a copy of the report and a summary of rights. You also need to give the person these four things:

- the name, address, and phone number of the credit reporting agency (CRA),
- a statement that the CRA did not make the adverse decision
- notice of the right to dispute the accuracy or completeness
- notice of the right to another free credit report from the agency within 60 days

Once you finish reference checks or other background checks, it's time to review your process and documentation.